TABLE OF AUTHORITIES CITED

CASES	PAGE
American Federation of Labor v. Swing, 312 U. S. 321	17
Ballenbach v. United States, 326 U. S. 613	32
Bridges v. California, 314 U. S. 252	17
Burnham v. Morrissey (14 Gray, Mass.)	4
Cantwell v. Connecticut, 310 U. S. 296	23
Cummings v. Missouri, 4 Wall. 277	19
Daugherty's case, 273 U. S. 175	4, 24
De Jonge v. Oregon, 299 U. S. 353	18
Eisler v. United States, 93 Sup. Ct. Adv. Op., June 27, 1949	2, 3, 12
Eisler v. United States, 338 U. S. 189	13
Gideon v. United States, 52 F. 2d 427	38
Grosjean v. American Press Co., 297 U. S. 233	20
Hannegan v. Esquire, 327 U. S. 146	18
Herndon v. Lowry, 301 U. S. 242	18
Kraus v. United States, 327 U. S. 614	32
Marsh v. Alabama, 326 U. S. 501	17
Meyers v. United States, 171 F. 2d 800	27
Minersville School District v. Gobitis, 310 U. S. 586	16
National Martime Union v. Herzog, 78 Fed. Supp. 146; aff'd 334 U. S. 854	13
Near v. Minnesota, 283 U. S. 697	20
Pacific Railway Commission, In re, 32 Fed. 241	24
Schneiderman v. United States, 320 U. S. 118	18
Sinclair v. United States, 279 U. S. 263	4, 24
Smith v. Texas, 311 U. S. 128	39
Stromberg v. California, 283 U. S. 359	18
Thiel v. Southern Pacific, 328 U. S. 217	39
Thomas v. Collins, 323 U. S. 516	19

PAGE

Thornhill v. Alabama, 310 U. S. 88 ..... 19, 20

United Brotherhood of Carpenters v. United States, 330 U. S. 395 28

United States v. Lovett, 328 U. S. 303 ..... 20, 21

United States v. Smith, 286 U. S. 6 27

Watts v. Indiana, 93 L. Ed. Adv. Op. 1438 ..... 7, 25

West Virginia State Board of Education v. Barnette, 319 U. S. 624 ..... 16, 18, 19, 24

STATUTES

Legislative Reorganization Act of 1946, Chap. 753, Sec. 121(b), 60 Stat. 812 15

Legislative Reorganization Act of 1946, Sec. 133e (60 Stat. 812) .. 36

Revised Statutes, Sec. 102 22

Taft-Hartley Act, Sec. 9h 13

United States Code, Title 2, Sec. 194 ..... 34, 37

United States Constitution, Art. I, Sec. 9, Clause 3 27

United States Constitution, First Amendment 6, 7, 14, 15, 19, 23, 24

United States Constitution, Fourth Amendment 6, 7, 14

United States Constitution, Fifth Amendment 6, 7, 9, 10, 14

United States Constitution, Ninth Amendment 3, 7, 8, 15

United States Constitution, Tenth Amendment 3, 7, 8, 15

TEXTBOOK

3 Corpus Juris Secundum, p. 328 28

IN THE

Supreme Court of the United States

October Term, 1949

Nos. 248-249

JOHN HOWARD LAWSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

DALTON TRUMBO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

PETITIONERS' REPLY BRIEF.

The Government's brief in opposition appears to concede that certiorari ought to be granted, limited, however, to that question now pending in *Dennis v. United States* (No. 14, this term), concerning the qualification of government employees to sit in cases of the instant type. The Government further contends, however, that all other constitutional questions involved, while of great importance, have already been resolved adversely to the petitioners by prior decisions of lower Courts.

While we agree that the jury question is the same here as in the *Dennis* case, it is our earnest contention that none of the constitutional questions involved in these cases having as yet been determined by this Court, but they should be because of their grave and transcendent importance.

It is true that some of the constitutional questions here urged are present also in *Eisler's* case (No. 255, October Term), and that they are still pending before this Court and are as yet undetermined. Of those unresolved issues, and of their profound significance, present and late members of this Court have but recently said:

> "Those issues did not leave when Eisler did. They remain here for decision; they are of the utmost importance to the profession and to the public." (Mr. Justice Murphy, at p. 1330, *Eisler v. United States*, 93 Sup. Ct. Adv. Op., June 27, 1949.)

and,

> "These questions are recurring ones, certain to be repeated, for the grant of a review has cast doubt not only on the validity of Eisler's conviction but upon congressional procedures as well. No one can know what the law is until this case is decided or until someone can carry a like case through the two lower courts again to get the question here . . . But it is due to Congress and to future witnesses before its committees that we hand down a final decision." (Mr. Justice Jackson, at p. 1330, *idem.*)

But additionally, these petitions present certain further and different constitutional problems which are not involved in *Eisler's* case or in any other of the cases hereto-

fore passed upon or presently pending. Nor does the Government's brief in opposition reach them. Instead of answering the constitutional questions arising out of the facts of these cases and stated in the petitions [see questions I-VI, inclusive, pp. 23-25 Lawson petition] the Government posed limited questions disregarding the entire factual context of these cases and avoiding many of the constitutional issues presented thereby.[1] We shall list these issues briefly.

(a) Among the additional constitutional questions here involved is the question whether the power of this official branch of the government, viz., the House Committee on Un-American Activities, was exercised *in this particular hearing as against these particular petitioners and others similarly situated in conformity to the Constitution and particularly in conformity to the Fourth, Fifth, Ninth and Tenth Amendments thereof* (*as well as the First*). In short, petitioners contend (and the facts here are not in dispute), that in this particular investigation into the Hollywood motion picture industry and as to them as motion picture wirters, the Thomas Committee acted in excess of the lawful bounds of its power and that they could therefore rightfully have refused to answer the interrogatories.

That question, under the weight of the authorities, is a legal, and not a political question and is one properly reviewable by the judiciary.

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[1]Pages 17, 18 and 19 of the Government's brief in opposition here are an almost exact duplication, word for word, of pages 48, 49 and 50 of the brief for the United States in the *Eisler* case (Oct. Term, No. 255). This may account for the inappositeness of much of the argument in opposition of the Government in the cases at bar.

In the landmark case of *Burnham v. Morrissey* (14 Gray) (Mass.), it was declared:

> "The House of Representatives is not the final judge of its own powers and privileges in cases in which the rights and liberties of the subject are concerned; but the legality of its action may be examined and determined by the Court. . . . Especially is it competent and proper for this Court to consider whether its proceedings are in conformity with the Constitution and laws, because living under a written constitution no branch or department of the government is supreme; *and it is the province and duty of the judicial department* to determine, in cases regularly brought before them, whether the powers of any branch of government and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." (Emphasis supplied.)

Thus in *Daugherty's* case, 273 U. S. at 175:

> "We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But, if contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourne v. Thompson* and *Marshall v. Gordon,* point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourne v. Thompson* and *In Re Chapman,* that a witness may refuse to answer WHERE THE BOUNDS OF THE POWER ARE EXCEEDED." (Emphasis supplied.)

And in *Sinclair v. U. S.,* 279 U. S. 263:

> "While the power of inquiry is an essential and appropriate auxiliary to the legislative function, it

must be exerted with due regard for the rights of witnesses and that a witness *rightfully may refuse to answer where the bounds of power are exceeded. . . .*" (Emphasis supplied.)

But the Court below held and the Government now contends that there can be no judicial review of a congressional investigation to determine whether in fact and in actual application to private citizens the particular investigation did exceed the lawful bounds of the power. In short compass, the undisputed facts out of which the asserted violations of the constitutional rights of petitioners arose are these:

In October, 1947, the House Committee on Un-American Activities conducted an investigation of the Hollywood motion picture industry. Throughout the course of that particular hearing it called for the blacklisting and the discharge of certain writers and directors whom it considered Communists or "fellow travelers." These petitioners were among those writers. Before they were called to the stand, their employers preceded them, and this official agency of government—the House Committee—then and there directed these employers to utilize their employers' association as the instrumentality to effectuate that demanded blacklist and that discharge. While all this was going on, the House Committee overruled petitioners' request that they be afforded, in such a setting, certain minimum procedural rights of due process—a chance to cross-examine their accusers, to present statements in their defense. All these requests were denied. At the hearing and as one of the direct and avowed objects thereof, the Committee utilized its power as an agency of government directly to censor the content of films as well as the content

of the particular writings, thoughts, and associations of petitioners. The petitioners, against that background, were then called upon to disclose to the Committee their trade union and political affiliation, under pain of contempt. And finally, the Committee authoritatively asserted that the petitioners were called as witnesses at that particular hearing so that they would "have their day in Court, so to speak, to answer if they could the allegations which had been made against them."

The Government's only answer to these undisputed facts is that they give rise to no constitutional issue, and indeed that they raise no legal question at all. If the Government's view is correct, then a Congressional investigating committee can do no constitutional wrong to the private citizen before it. The Court should resolve this arresting problem.

(b) The petition further presents the question whether in the context of this hearing, this investigating agency of government was reviving the oath *ex officio,* contrary to the First, Fourth and Fifth Amendments by compelling the private citizen witness to disclose whether he was or was not a member of the Communist Party, or whether he was or was not a member of the Screen Writers Guild.

According to the Committee's own statements, it was conducting an investigation to ascertain what persons employed in the motion picture industry in Hollywood were Communists. To this end, the Committee asserted, it required witnesses to affirm or deny under oath whether or not they adhered to the political "heresy" of Communism. Is this or is it not an oath *ex officio* condemned by the First, Fourth and Fifth Amendments? No answer to this can be found in the Government's brief. The pages of

history bear witness to the importance of this issue. To this Court, it presents the question whether the inquisition in modern dress shall be judicially sanctioned.

The argument supporting the proposition that the question was such a proscribed revival of the oath *ex officio* is set out at pages 37-51 of the Lawson petition.

This proposition has never been decided by this Court, although the problem of the governmental utilization, in a particular proceeding, of the forbidden oath has long been the subject of comment by, and the concern of, this Court (*cf. Watts v. Indiana,* 93 L. Ed. Adv. Op. at p. 1438 and again at pp. 1148, *et seq.*).

(c) These petitions, and these alone, present the question whether the Committee's utilization of governmental power to compel answers to these particular interrogatories was contrary to the First, Fourth and Fifth Amendments as both a forbidden and an unreasonable search by officialdom into belief and association, in disregard of the right of the individuals to be let alone with respect to these matters (see pp. 43-51 of Lawson Petition). This issue has not been, but ought to be, resolved by this Court.

(d) Petitioners raise the question of the impact of the Ninth and Tenth Amendments upon the asserted congressional power of investigation of the beliefs and opinions of a private citizen where neither acts nor conduct is involved, but only the expression by the people of political and economic opinion and association. Petitioner has asserted and reasserts that under our system the people, as the ultimate sovereign, cannot be made to account to their servants, the officials of government, as to the nature or the content of their political or economic beliefs or asso-

ciations. For their acts and conduct private citizens may, in proper cases, be held to answer; for the nature, kind or the quality of their thoughts or association, they need answer to no official, high or petty.

We say that the effort by government to compel disclosure of the private citizen's politico-economic "unorthodoxy," whether asserted by a congressional investigating committee or by a school board or by any other arm of the State, directly impairs the ultimate sovereignty of the people guaranteed by the Ninth and Tenth Amendments. The interrogatories here put concerning petitioners' orthodoxy were not asked *in vacuo;* they were not part of some illusory census taking; they were designed (and the whole committee has here declared that they were thus designed) to compel compliance with a norm of belief considered by the Committee to be the only true "Americanism." Whether or not such compulsion comports to our constitutional system presents a question as compelling as any in our time. It is not answered by references to the right to unseat congressmen at ensuing elections.

(e) The Government makes no reply to petitioners' contention that this particular investigation constituted censorship of motion pictures (Lawson Petition 61-68).

That direct governmental censorship of ideas is at odds with the Constitution is hardly open to question. But the drive of some public officials to establish control over the minds and voices of the people through such censorship continues. The direct road being blocked, the same goal is nevertheless sought through devious detours. Taxation and denial of the use of the mails have been tried. But this Court has barred the way. It has affirmed the propo-

sition that it is censorship which the Constitution forbids regardless of the route by which it is reached.

The Government concedes that the Committee's hearings may have influenced the content of motion pictures. It disposes of this striking concession by the assertion that such an "indirect consequence may result from any investigation." Ignored is the fact that the Committee in the hearings demanded of the producers that they make motion pictures which conform with views of the Committee members and that they discharge and blacklist non-conforming writers, producers and directors. If censorship thus resulting be an "indirect consequence," it is not an incidental one. Nor is the censorship any less direct than was that achieved by taxation and by foreclosing the use of the mails. The very concession that censorship is thus achieved by a new method presents to this Court a constitutional question of first magnitude.

(f) Petitioners have predicated one of their major contentions upon the claim of violation of the due process clause of the Fifth Amendment. Except for a casual reference to the facts upon which the contention is based, the Government has chosen to ignore the point. Let it be clear that petitioners are concerned here not with the motives of the Committee—*i. e.*, the reasons for its action—but rather with the Committee's use of its power as an agency of government—*i. e.*, what it actually did officially in this particular hearing.

This is not a situation in which the action of the Committee was within the scope of its authority, with the claim being advanced that its motives for such proper action were impure; this is a case in which the action of the Committee was in excess of its power, regardless of its motives,

and therefore it violated the constitutional rights of petitioners. The Committee *did* establish for itself standards of "un-Americanism" and it *did* decide for itself what punishment should be inflicted for the violation thereof; it *did* apply such standards to past conduct; it *did* adjudicate the "guilt" of the petitioners; and it *did* use its powers to inflict punishment upon them; in the process of so doing it *did* violate the basic concepts of justice established by civilized society, thereby denying to petitioners every aspect of due process.

Unless it be clear that the due process clause of the Fifth Amendment is inapplicable to the utilization of governmental power by Congressional committees, this action of the Committee in excess of its power presents a serious question of due process. Such a question has always been treated as judicial in character, and it cannot be brushed aside by the Government's *ipse-dixit* that this is a mere abuse of power for the people to correct.

The failure of the Government to consider these contentions is particularly important in the light of its position that the derelictions of the Committee may be corrected only by the electorate. Yet it is this very power of the electorate to determine, free from coercion, who shall represent the people and how they shall do so which is is for the people exercising their sovereign powers to being impaired by the Committee. The assertion that it remedy the abuses of their governmental servants, but that these very servants have the right to impede the exercise of this sovereign power is a *non sequitur*. Only an independent people can exercise such sovereignty. The silence of the Government on this vital issue cannot conceal its gravity.

In the balance of this brief we shall answer those specific arguments which the Government did advance and for ease of reference we shall follow, so far as possible, the same paragraph numbering which the Government used for each of its separate contentions in its brief in opposition.

(1) We are told first that petitioners are foreclosed because of the rule laid down in *Barsky v. U. S.* and in *Josephson v. U. S.* Fortunately, however, the Government itself has already adequately distinguished these two cases from ours.

Thus, in *Barsky's* case the Government, in addressing this Court, declared:

> "It may be noted in this respect that on the facts of this case the Court below need not have gone any further in its opinion on this issue than the last full paragraph which appears at 633 of the record. The remaining discussion assumes that questions possibly might be asked of petitioners which would have demanded disclosure that they are believers in Communism or members of the Communist Party. But such questions were not asked, *and the case thus does not present that question.*" (See brief of Government in opposition in *Barsky v. U. S.* at p. 13 thereof.)

But this case does present that very question which the Government has already confessed was not involved in *Barsky's* case. And of course in *Barsky's* case there still pends a petition for rehearing for this Court, which at this writing is undetermined.

The next authority cited as adversely determinative of this petition is the *Josephson* case. But at pages 7 and 8 of the Government's brief in opposition to the *Josephson* petition for certiorari (No. 535, October Term 1947), it

was asserted there that Josephson, unlike these petitioners, had refused to be sworn, had refused to answer any questions whatever, and had chosen to attack the legality of the Committee's enabling resolution before any of his rights were threatened by the Committee, and therefore said the Government, Mr. Josephson had no standing whatever to raise the constitutional issue. And it continued to be the position of the Government that there was a meaningful distinction between the instant case and *Josephson's* case, for one year later we observe that in its brief in opposition filed with this Court in *Eisler's* case (October Term, 255) the Government declared:

> "Here as in the *Josephson* case, it is questionable whether petitioner has standing to challenge the constitutionality of the committee's authority in view of his refusal to submit to any and all interrogations except on conditions which we shall show he had no right to impose. In our brief in opposition to the *Josephson* case (No. 535, October Term 1947), we pointed out (pp. 7-8) that Josephson . . . had chosen to attack the legality of the committee's enabling resolution before any of his rights were infringed or threatened by the committee, and therefore had no standing to raise constitutional issue."

There could be no clearer concession that the denial of the writ in *Josephson's* case does not preclude the determination at this time of any of the issues here involved.

None of the other cases referred to in paragraph 1 (pp. 13-14) of the Government's brief has as yet been determined by this Court; it is therefore unnecessary to

argue their ineffectiveness now to foreclose the grant of the writ here sought.[2]

As ultimate authority for the proposition that this Court has already held that no constitutional right is impinged or burdened by the compulsory disclosure of political belief or affiliations, we are finally cited by the Government to the case of *National Maritime Union v. Herzog,* 78 Fed. Supp. 146, affirmed 334 U. S. 854. But this Court expressly declined to affirm and instead left open, that part of the ruling of the statutory court in the *Herzog* case which upheld the constitutionality of section 9h of the Taft-Hartley Act (the non-Communist oath requirement); the memorandum decision of this Court so holding is set out in 92 L. Ed. 1776, and is as follows:

> "June 21, 1948. Per Curiam: The decision of the statutory three judge court is affirmed to the extent that it passes upon the validity of section 9f and (g) of the National Labor Relations Act, as amended by the Labor Management Act of June 23, 1947, . . . *We do not find it necessary to reach or consider the validity of section 9h.* . . ." (Emphasis supplied.)

The *Herzog* opinion thus leaves this precise problem open and undecided. It seems clear, therefore, that no

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[2]The remaining cases referred to in the Government's brief are clearly neither determinative nor persuasive:

Eisler v. U. S., 338 U. S. 189, cert. granted, removed from docket;

Dennis v. U. S., cert. granted on jury question;

Marshall v. U. S., petition for cert. pending, No. 197;

Morford v. U. S., petition for cert. pending, No. 236.

anterior decision of this Court precludes the grant of certiorari on any of the constitutional issues here involved.[8]

2. The importance of the constitutional questions raised in the petitions for writs of certiorari is accentuated by the Government's discussion of the issues in its opposing brief (pp. 14-20). The views therein expressed on the protection—or rather lack of protection—which the Bill of Rights affords ordinary citizens in their relations to the State have never been stated in any decision of this Court. The Government's position, if accepted, would validate governmental action the admitted effect of which is to prevent the uncoerced expression of opinion. It would uphold the right of Government to act in a manner which burdens certain types of speech—because governmental officials assert that the beliefs expressed are evil. Therefore, it is of the utmost public importance, the petitioners respectfully submit, that this Court finally determine the fundamental issues raised herein.

These cases involve more than the issue of the violation of the First Amendment as posed by the Government in its brief at page 14. The issue of compulsory disclosure of political faith, speech and association and of restraints in these areas involves the Fourth, Fifth, Ninth and Tenth Amendments as well as the First. Because the Government has failed to discuss the impact of these Amendments upon the problems presented, petitioners rest upon the petitions herein with respect to said matters.

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[8]Certiorari was granted during the last term in the *Parker* case (No. 711, Oct. Term, 1948) involving the same problem, placed in the context of state action.

At the outset, we must deal with the Government's contention that the First Amendment's prohibition against the enactment of a law abridging freedom of speech does not apply to the claimed right of Congress to inform the public. In the first place, "informing the public" is quite distinct from "exposure," through compulsory disclosure of belief and opinion, for the purpose of blacklisting and censorship. This distinction creates a constitutional question of basic importance for this Court to determine.

Moreover, this argument begs the question. The asserted power to inform the public[4] is here predicated upon a statute. One issue presented here is whether the statute as construed to grant this right to inform the public casts an unconstitutional burden upon free speech.

The particular statute enacted by Congress, Legislative Reorganization Act of 1946, Chapter 753, Section 121 (b), 60 Stat. 812, 823, 828, creating a Committee on Un-American Activities, authorized it to conduct an inquiry into opinion and belief, and to compel the disclosure of beliefs and opinions by the subpoena process. Whether such a statute can be squared with the fundamental law is a question which only this Court can answer under its constitutional commission. The question is one of transcendent importance. Its answer does not affect the general investigatory power of Congress, nor does it call for judicial interference with the legislative process as the Government brief implies. A law which abridges freedom of speech is no less invalid under the Constitution because the means used is the investigatory process, than

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[4]That no such power exists, except as it results incidentally from an investigation designed to secure information with respect to legislative problems, is argued in the petition and is not dealt with in the Government's brief.

is a law which curtails the dissemination of ideas by the use of the taxing power or the commerce power. The vice of these statutes lies not in the means used, but in the ends attained.

Clearly, this Court has never conceived the determination of the unconstitutionality of federal or state statutes under the Bill of Rights as an interference with the legislative process, or simply as a matter which "lies with Congress and, ultimately, with the voters" (Govt.'s Br. p. 20).

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."
>
> *West Virginia State Board of Education v. Barnette,* 319 U. S. 624, 638.

See also the dissenting opinion of Chief Justice Stone in *Minersville School District v. Gobitis,* 310 U. S. 586, 605-607.

The claim of the petitioners here is that the provisions of the statute enacted by Congress creating the Committee on Un-American Activities are unconstitutional, that the measure acts as a pervasive restraint upon their basic freedoms to think and speak freely, and that Congress was without power to so infringe upon their liberties.

Furthermore, whether the restraint claimed is the result of a law or of any other exercise of official authority is immaterial. "Where the First Amendment applies, it is a denial of all governmental power in our Federal system."

(*Marsh v. Alabama,* 326 U. S. 501, 511.) See also *Bridges v. California,* 314 U. S. 252, and *American Federation of Labor v. Swing,* 312 U. S. 321. This principle we apprehend embraces the congressional investigatory process of our Federal system.

It is the claim, that liberty has been infringed by the unlawful exercise of governmental authority, which the petitioners have asked this Court to adjudicate. To such a claim, especially as it arises in a new and significant context of circumstances, this Court has never turned a deaf ear.

In the second place, the Government appears to overlook the importance of the question, not heretofore passed upon by this Court, concerning the operation and effect of the statute herein involved. The petitioners have raised the problem of the unconstitutional construction and application of the measure creating the Committee on Un-American Activities in these particular cases. They contend in their petitions (p. 18) that the Committee construes its powers under the enacting statute as authorizing it "to censor the screen by dictating to the film producers both the contents of films to be made by them and the political qualifications of the personnel to be employed in the production of motion pictures." The Government in its opposing brief implicitly concedes that the question is fairly presented by the petitioners, for the Government avers (p. 19):

> "It is our position, simply stated, that the Committee was empowered—and constitutionally so—to inquire into the extent to which this medium of mass communication (the motion picture) was being used to spread Communist propaganda, . . ."

The Government's position of necessity is that, under the statute creating the Committee, Congress has the right to control the spreading of propaganda by a medium of mass communication. Such control is censorship. There is no decision of this Court, nor can one be envisaged, which sustains a statute authorizing officials of Government to censor, dictate or prescribe the content of ideas disseminated by citizens or organizations of citizens. "If there are any circumstances which permit an exception, they do not now occur to us." (*West Virginia State Board of Education v. Barnette, supra,* 642). See also *Hannegan v. Esquire,* 327 U. S. 146. A determination of this issue is of importance to every segment of the population, to the radio, to the press, to industry, to trade unions, to political, social and economic organizations, to educators, scientists, ministers—indeed, to the multiford individuals and organizations in America engaged continually in the dissemination of ideas. The problem is a recurring one (*e. g.,* the recent request by the Chairman of the Committee to the various colleges throughout the nation for a list of the textbooks used in the schools) and should be resolved by this Court.

A third facet of this constitutional issue which the Government appears to gloss over is the right of the Committee on Un-American Activities to compel the disclosure of one's political affiliation or trade union membership. The question is novel and has never been answered by this Court. The public importance of the question appears clear. Decisions of this Court such as *Stromberg v. California,* 283 U. S. 359; *De Jonge v. Oregon,* 299 U. S. 353; *Herndon v. Lowry,* 301 U. S. 242, and *Schneiderman v. United States,* 320 U. S. 118, would appear at least to have established that the right to peaceably associate with others of a similar political creed is a right fully protected

from governmental abridgement under the First Amendment. A similar conclusion with respect to trade union membership would appear to flow from the decisions of this Court in *Thornhill v. Alabama,* 310 U. S. 88, and *Thomas v. Collins,* 323 U. S. 516. Whether the compulsory disclosure of such political and trade union membership constitutes a restriction upon this fundamental right of association, particularly where the disclosure is required as part of an investigation in the area of speech, association and belief, is, of course, the critical issue here. Decisions of this Court running from *Cummings v. Missouri,* 4 Wall. 277, to *West Virginia State Board of Education v. Barnette, supra,* would appear to sustain, it is respectfully submitted, the petitioners' view that the compelled expression under Governmental compulsion of one's political or economic creed, in the course of an investigation into speech, association and belief, constitutes an unlawful burden upon freedom of the belief, speech and assembly protected by the Bill of Rights. Since the practice of compulsory disclosure of opinion and belief appears to be gaining momentum among officials of Government on federal, state and local levels, the need for a definitive determination of the question by this Court becomes increasingly important.

In the light of the foregoing, the Government's discussion of the constitutional questions in its opposing brief appears only to emphasize the need for a final resolution by this Court of the basic issues involved herein. The argument of the Government in its essence has a two-fold character. On the one hand, it is urged that the statute creating this particular Committee neither on its face nor in operation and effect constitutes a burden upon freedom of belief, speech or assembly. On the other hand, if the

Court does not accept this view, then the Government urges that such burdens are constitutionally appropriate because freedom of belief, speech and assembly are not absolute.

It appears to the petitioners, it is respectfully submitted, that the Government's first argument overlooks the record and disregards the applicable law. The notion that a statute which impinges upon speech or assembly is constitutionally valid so long as it refrains from using language of restraint, punishment or compulsion (Govt.'s Br. p. 16) runs counter to history and to law.

> "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." (*Thornhill v. Alabama, supra,* 97.)

See also:

Near v. Minnesota, 283 U. S. 697;
Grosjean v. American Press Co., 297 U. S. 233;
United States v. Lovett, 328 U. S. 303.

Moreover, the Government appears to misconceive the construction and application which this Committee gives to its own authorizing statute. This Committee construes its power under the law as authorizing it to direct the discharge and blacklist of individuals in private industry, as authorizing it to censor the content of motion pictures and to dictate to the motion picture industry the political and trade union qualifications of personnel employed therein (Lawson Petition, p. 30). The record here amply establishes the Committee's own view of its powers. Whether such a construction of the statute is constitutionally valid is a question which should be determined by this Court.

The petitioners submit that it is a matter for public concern when officials of Government state that "while disclosure before the Committee of membership in the Communist Party or the Screen Writers' Guild may have caused petitioners unfavorable publicity and consequent economic damage, and thereby, have discouraged others from subjecting themselves, by affiliation with the Party or the union or by the expression of heterodex beliefs, to the risk of a similarly unfavorable reaction from the public and their employers, and while the content of motion pictures may have been influenced by the producers' fears lest the use of the screen to express any ideas other than those deemed proper by the Committee might result in unfavorable publicity, it does not follow that the First Amendment was violated." (Govt.'s Br. pp. 16-17.) It is a grave assertion for the Government to make that a statute construed to cast the burdens of loss of employment and censorship upon the exercise of freedom of speech and assembly is nevertheless free from constitutional taint. This Court has held to the contrary. *(United States v. Lovett, supra).* Thus, the Government's very assertion poses a constitutional question of great consequence.

At page 17 of its brief, the Government presents the view that the First Amendment "was not intended to protect persons against unfavorable public opinion, even though such opinion may be stimulated by disclosures made to or by an investigation." If by this assertion the Government means that in an investigation into acts and conduct no protection is afforded against unfavorable publicity, then the Government is not discussing the issues presented in this case. On the other hand, if the Government means that this Committee may investigate into the area of opinion and thereby expose to public disfavor the

views or affiliations of the unorthodox, then the issue is drawn. Where compulsory disclosure by Government in a proceeding concerned with belief and its advocacy actually does burden speech, that compulsory disclosure, like any other Government action, runs afoul the First Amendment.

Moreover, the petitioners contend that it was not mere "unfavorable publicity" which engendered the economic sanctions or the censorship to which the Government refers, but rather the action of the Committee itself in the exercise of its alleged powers. We deal here with individuals singled out by the Committee for punishment through loss of employment and blacklisting, and with censorship of the content of their medium of communication. We deal here not with "*any* public investigation" (Govt.'s Br. p. 17), but with an investigation by a particular Committee whose particular authorizing statute is under constitutional attack.

The attempt on the part of the Government to create the illusion that the authorizing statute, neither on its face nor on its application, imposes any sanctions or restraints is fruitless. The statute itself vests power in the Committee to compel the presence of persons and the production of their books and papers through the subpoena process, with the ultimate power to invoke the aid of the courts in inflicting punishment by imprisonment and fines upon reluctant witnesses. (R. S., Sec. 102.)

Contrary to the Government's assertion (at p. 17 of its brief) petitioners do not contend for a "freedom to be silent generally." Petitioners do urge that, *within the domain of the mind*—that is, of opinion, speech and association—the Government may not constitutionally compel disclosure from the private citizen. In effect, the Gov-

ernment states that unless there is an unlimited right of investigation into every area, including that of the First Amendment, there is no right of investigation at all. Petitioners reply that there is a right of investigation but that it is not unlimited, as the Government asserts.

The other argument advanced by the Government is that since "First Amendment rights are not absolute" (Govt.'s Br. p. 18), it was lawful to impose the burdens admittedly placed upon the petitioners' speech and assembly. This contention seems equally untenable. A statute must be so narrowly drawn as to deal only with acts and conduct; otherwise it collides with the First Amendment which precludes any governmental action which infringes upon the content of belief and speech. "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." (*Cantwell v. Connecticut*, 310 U. S. 296, 303.) The Government makes no contention that the statute creating this Committee is narrowly drawn, nor that it has been construed and applied only to acts and conduct. Quite the contrary. The statute is limitless in scope, and it has been construed by the Committee here as authorizing the compulsory disclosure of all beliefs and opinions and of associations with respect thereto.

The Government urges that "the need for accurate firsthand information as a basis for governmental action has been deemed to outweigh the personal inconvenience resulting from compelled disclosures" (Govt.'s Br. p. 18). The petitioners submit that this "balancing of social interest" argument has no applicability in this case. We are concerned here solely with a statute dealing with belief and opinion, and the power of Government acting there-

under to compel disclosure in that area. If that area be completely free from governmental intrusion, it is not sufficient to assert that Government may nevertheless intrude when officials of Government deem it in the public interest to intrude. The concept of the First Amendment that "Congress shall pass no law . . ." woud be converted to the proposition that "Congress shall pass no law except when it appears essential to the public interest." We know of no freedom which would be secure if such constitutional principle were established. This Court has, however, made it abundantly clear that such rule does not prevail. It has stated that no citizen can be forced "to confess by word or act" his faith in politics or other matters of opinion, (*West Virginia State Board of Education v. Barnette, supra,* 642) —no matter how significant the public interest may be, *e. g.,* national unity in the flag salute case. It is in the area outside of opinion and belief that the need for "accurate first-hand information as a basis for governmental action" may outweigh "the personal inconvenience resulting from compelled disclosures." (*Sinclair v. United States,* 279 U. S. 263; *Daugherty v. United States,* 273 U. S. 175.) The distinction was noted early in the history of the country. (*In re Pacific Railway Commission,* 32 Fed. 241, 250 (C. C. N. D. Calif, 1887, Opinion by Field, J.).)

The Government grasps at the notion that compulsory disclosure of the petitioners' political and trade union affiliations was justified as a "preliminary examination to establish witnesses' interest and bias so that their testimony can be evaluated" (Govt.'s Br. p. 16). The record here clearly establishes that in the case of each of the ten witnesses involved, the sole and ostensible purpose of the Committee was to compel the disclosure of their political

and trade union affiliations. In not a single case did the Committee pursue any further line of inquiry. When it failed to compel the answer it sought, each witness was ordered from the stand. This case, therefore, presents the question whether the petitioners could be lawfully compelled to disclose their political and economic creeds, with nothing more.

The Government's recurring allusion to the investigation by the Committee on Un-American Activities into the "operation," "conduct" and "activities" of witnesses as a justification for obtaining a census of the number of members in a political party and trade union distorts the facts revealed in the record. These witnesses were not asked at any time any questions concerning their "conduct," "activities" or "operations."

The power which it is asserted the Committee has to determine the number of adherents to a political or economic creed would authorize the Committee to take a compulsory political and economic opinion census of every person in the United States. This is what the inquisition sought.

On the constitutional issues here, the petitioners urge upon this Court the great public importance of the questions involved. In their essence, the issues involved present another problem in the age-long conflict between the inquisitorial and accusatorial systems of law. Compare, *Watts v. Indiana, supra.* Compulsory disclosure by Government of one's opinions and beliefs and his speech or association with respect thereto have heretofore been unknown to the American tradition, except as an aberration to be quickly extinguished. This Court, it is respectfully submitted, should finally determine for the benefit of

the people, as well as officials of Government, the constitutional validity of the Committee on Un-American Activities, and the lawfulness of the construction and application which the Committee gives to the statute authorizing its creation.

3. Petitioners were summoned to appear before the Committee. They were charged with contempt for refusal to answer questions put to them by the Committee. Proof of the existence of a lawfully constituted committee is therefore essential to uphold the conviction. If the questions were not put to petitioners by the Committee, then these cases should be dismissed.

It is conceded that a quorum of the full Committee was not present when petitioners were questioned. The Government's case depends upon the authority possessed by the Chairman when he was claimed to have appointed[5] the subcommittees which put the questions to petitioners.

The Government makes no contention that, prior to the appearance of petitioners, the full Committee had ever given authority to the Chairman to make such appointments. Rather, in its reply brief (p. 20), the Goverment argues that the Chairman had an "initial" authority to appoint a subcommittee, subject to "an ultimate veto power" in the full Committee. The proposition is then advanced that the report to the House by the full Committee (on November 17, 1947, twenty days after petitioners' appearance before the purported subcommittee) may be con-

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[5]At page 8, footnote 3, of its brief, the Government, after correctly stating the record pertaining to the *Lawson* case, goes on to say that the Chairman's announcement before Trumbo testified was "almost identical." This is not so, and the distinction is argued in Trumbo Pet. p. 26.

strued as a "tacit recognition" by the Committee that its Chairman had authority to designate subcommittees.

If this presumed tacit recognition of the Chairman's claimed authority had taken place *before* petitioners testified, the case would have fallen within the precedent set in *Meyers v. United States,* ..... App. D. C. ....., 171 F. 2d 800, and discussed at T. R. 371-3.

It is a vastly different situation when the necessary authority is conferred by tacit recognition *after* the alleged criminal refusal has taken place. This is an attempt to breathe life into a tribunal that was still in a legally embryonic stage when the disputed questions were put to the petitioners.

As we said in Trumbo Petition at page 27, such procedural short-cuts are available to Congress on intra-parliamentary matters but they cannot be used to make criminal, acts of private citizens which were innocent when committed (Art. I, Sec. 9, Clause 3, Constitution). Such rules of legislative convenience cannot be permitted to affect the rights and liberties of non-members of legislative bodies (*United States v. Smith,* 286 U. S. 6, 33).

There is a remarkable quality about the Government's position that "initial authority" is sufficient to constitute effective action even though it is subject to an "ultimate veto power." This is tantamount to saying that:

A. A bill passed by both houses immediately becomes law and continues in effect until the President vetoes it, or

B. A treaty once signed is effective until the Senate refuses to ratify it, or

C. A nominee for appointment while the Senate is in session takes title to the office until the Senate refuses to confirm the appointment.

The absence of a lawfully constituted quorum should have entitled petitioners to a directed verdict. Here, instead, the Court took the question entirely away from the jury, an error which we submit is fatal to the Government's case.

Clearly, the Chairman was the agent of the House and also the agent of the Committee. The existence and extent of the authority claimed to have been conferred on an agent is a question of fact to be determined by the jury (3 C. J. S. 328). Even if the facts concerning the existence of the Chairman's authority were not in dispute, this was a criminal case in which a directed verdict could not have been ordered against petitioners (*United Brotherhood of Carpenters v. United States,* 330 U. S. 395, 408.)

The Government argues that the question of the Chairman's authority is a question for the judge alone, not the jury. But if the Chairman's authority rests, as the Government claims, on "custom and practice," it would seem that there must be some evidence, before whoever is to decide the fact, that such a custom or practice exists. Having failed to adduce any such evidence in Lawson, we submit that the Government there failed to prove the existence of a validly constituted sub-committee.

In the *Trumbo* case the House Parliamentarian's testimony as to the Chairman's authority, was over petitioner's objection (T. R. 357-9), taken out of the presence of the jury. His testimony was offered to prove, as already stated, that the Chairman's authority to appoint a sub-committee was established by House practice. In such case, the Court might perhaps have charged the jury, as matter of law, that the sub-committee was val-

idly constituted if the jury should find, as matter of fact, the existence of a House practice of appointment of sub-committees by Committee Chairmen. We submit, however, that the existence or non-existence of the practice was for the jury, not as the Government argues, for the Court alone.

Moreover, the Government's brief makes no attempt to answer petitioners' contention that it was error to quash their subpoenas *duces tecum* for the House Committee's records (L. R. 344-6; T. R. 515), the evidence being desired to demonstrate that the Chairman had no authority to appoint the sub-committees here involved. Under the Government's contention that the Chairman's power is subject to review by the Committee (Govt. Brief p. 21), it certainly would have been competent to show, if it was the fact, that the Committee had taken positive action to deprive the Chairman of the power. The Committee's records could have also been offered to negative the existence of any general House custom or practice authorizing the appointment of sub-committees by committee chairmen. In quashing the subpoenas on grounds of the immateriality of the evidence sought, the Court denied petitioners the right to prove from the Committee's records that no House practice authorized the Chairman of this Committee to appoint a sub-committee, or if there was such a practice, the Committee, as it had power to do, had deprived its Chairman of that authority.

Therefore, both because there was no showing of the existence of a lawfully-constituted subcommittee at the time petitioners testified and because the trial court took the question from the jury and decided it adversely to petitioners, these cases should be reversed.

4. To the claim that the instructions of the trial court in the *Lawson* case were prejudicially erroneous with respect to the central issue of fact—*i. e.*, did the proof show that the witness had deliberately and intentionally *refused* to answer—the Government makes the ever convenient rejoinder that when the charge is viewed in its entirety it ". . . loses the prejudicial color which, in the abstract, it might have had."

When dealing not with an abstract definition, as at L. R. 357, but with the facts in this particular case, the trial court said:

> ". . . If you believe . . . beyond a reasonable doubt . . . that he refused to answer questions it is your duty to return a verdict of guilty. Now when I use the words, 'refuse to answer,' I mean this. When you ask a question you are asking something to be answered; and an answer means a responsive reply. An answer, as far as this case is concerned, does not mean any kind of reply that a person desires to give, but it means responsive to the question put, so that, as I say, if you believe beyond a reasonable doubt that the question was asked and the defendant did not give a responsive reply it is your duty to return a verdict of guilty." (L. R. 358.)

The Court then goes on to say:

> "There were four questions that were asked, and I do not mean to comment on the evidence but the court will refer to it because it is the crux of this case." (L. R. 358.)

The Court then states the four questions, and immediately after repeating to the jury the answers of Mr. Lawson, the Court gave this final charge on the subject:

> "Now in testing whether or not you believe from the evidence that the defendant answered the question

propounded by the Committee, you must decide for yourself whether or not the answers given by the defendant to the question satisfy you now as to whether or not he ever was or is a member of the Communist Party. If you can come to a conclusion by the replies the defendant gave to those questions, if you can answer by those replies as to whether or not he ever was or is now a member of the Communist Party, then, of course, it is your duty to return a verdict of not guilty. If you cannot, you must return a verdict of guilty."

In the framework of such specific instructions, reaching, as the court said, the "crux" of the case, and dealing with the specific questions and answers, the crucial (and improper) charge—if the defendant "did not give a responsive reply, it is your duty to return a verdict of guilt"—is not cured, explained or softened by an antecedent general instruction concerning the meaning of abstract words like "wilful" or "inadvertent." Just as the general always yields to the particular when the meaning or purport of language is involved, so the specific and particular charges here determine the meaning conveyed by the sweep of the charge in its entirety.

The trial court here clearly conveyed to the jury that it should convict petitioner if it could not itself tell whether petitioner was or was not a Communist. This was the specific impression meant to be conveyed by the court's particular language and by its charge that if the defendant "did not give a responsive reply, it is your duty to return a verdict of guilty." It stretches too far the import of the clear meaning of words to laymen, to suggest that the improper effect of this language could be watered down by the portion of the charge cited by the Government.

By no test of contempt has it ever before been determined, as did the trial court here so clearly, that a witness is guilty of criminal contempt if he does not give a responsive reply to a question. As we have already indicated responsiveness or non-responsiveness may be some evidence of a refusal, but it is not conclusive proof of refusal as here charged. The misdirection is in the very "crux" of the case, as the trial court itself declared. It was therefore not a "technical error which did not affect the substantial rights of the defendant" (*Ballenbach v. United States,* 326 U. S. at pages 613-615).

Nor is the claimed error here met by the assertion of the Government that "a reading of petitioner's testimony makes it difficult to perceive how the Jury could have reached any other finding," because it is the rule that in view of the place of importance that trial by jury has "in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome the process may be" (*Ballenbach v. United States,* p. 616, *supra*).

And finally there is no conceivable way to reconcile the patently inconsistent rulings of the trial court to the effect first that it did not matter whether Mr. Lawson was or was not a member of the Communist Party [L. R. 356] and second that the jury must find the defendant guilty if it could not itself tell whether Mr. Lawson was or was not a member of that Party [L. R. 359]. The Government, wisely, has not attempted to reconcile these conflicting instructions. But they remain to vitiate the verdict (See *Kraus v. United States,* 327 U. S. 614, at 626, 627).

5. The record in the *Trumbo* case showed that while a witness before the Thomas Committee, Mr. Trumbo repeated his objections to particular re-phrased questions, and elaborated upon them. The trial court charged the jury that petitioner had no right so to do. The Government asserts this was a proper statement of the applicable legal principle, without citing any supportng authority whatever. We submit that neither statute nor case law condemns the mere repetition or elaboration of an objection; nor does it make such repetition or elaboration the compulsory hallmark of guilt. We assert that whether a witness is guilty of deliberate and intentional refusal to answer depends upon a jury's unfettered consideration of all the circumstances shown to exist at the time the witness testified, and not alone upon the elaboration or repetition of objections. This is particularly true here because the record conclusively shows that the investigators repeatedly reframed questions put to Mr. Trumbo, then withdrew them, then made rulings on questions and later reversed them, and that the Chairman gave certain directions to the witness which were followed by cross-directions from the Chief Investigator (See footnote 5, pp. 30-31 of the *Trumbo* petition).

6. It will hardly be denied that the Government carried the burden of establishing that the Committee was conducting an investigation under the authority granted to it. If that be so, it follows that the petitioner might by cross-examination establish the opposite—*i. e.,* that the Committee was not engaging in such an investigation but was engaged in an entirely different project. The Government seeks to justify the denial of such cross-examination upon the erroneous assumption that the cross-examination

was directed to the motives of the Committee. If, as the petitioners sought to establish, the Committee actually used its powers to establish a blacklist and censorship in the motion picture industry, it *acted* in excess of its powers and it may not get judicial support for such *action.*

Anything which casts light upon what the petitioners were trying to say while on the witness stand, particularly in view of the repeated interruptions by the Committee, was relevant to the issue of whether there were deliberate refusals to answer. The written statement and other documents which were rejected did cast such light and their rejection therefore was prejudicial error.

By the Government's own standards, the complete cross-examination of Chairman Thomas on the issue of pertinency should have been allowed. The existence of a "reasonable basis" for the investigation might appear clear when part of the testimony of a witness or witnesses is considered and yet be as clearly absent if the entire testimony of the same witness or witnesses were considered.

7. Petitioner Lawson's motion to quash the subpoena, his prepared statement and his application to recall for cross-examination witnesses who had previously testified were suppressed by the Committee in the report of the proceedings made by it to the House, Gov't. Exhibit 5 [L. R. 382-392].

The Government justifies this by arguing that 2 U. S. C. 194 does not require that "every paper delivered to a

committee by or on behalf of a contumacious witness must be incorporated in the report." But it is the House which must decide whether the witness was "contumacious," not the Committee. In order to arrive at this decision the House should have, at the very least a fair presentation of all that took place, even though briefly summarized.

If the Committee chooses to eliminate in a wholesale fashion, as was done in the present case, it must run the risk that at the point in the proceedings at which the witness is given an opportunity to be heard concerning the nature of the report, an impartial Court may determine that the matter eliminated was essential, and that its elimination deprived the report of a jurisdictional requisite.

The Government does not argue that the suppressed documents were unimportant or that, if revealed, they would not have altered the vote in the House. Instead the position is advanced that the House had "adequate information on which to base a decision" because Exhibit 5 "referred" to the suppressed matters. These "references" are only that:

A. Lawson said, during the pounding of the Chairman's gavel, that if cross-examination were permitted he could demonstrate the perjury of previous witnesses [L. R. 391] and

B. The Chairman's refusal to permit Lawson's statement to be read because he had "read the first line" [L. R. 386].

The House was thus left to conjecture as to what this first line was, as well as the rest of the prepared statement.[6] The Court is referred to Defendant's rejected Exhibits 4, 5, 6, and 7 [L. R. 394-411] for the text of the other suppressed documents.

Despite the Government's reliance upon the fleeting references to the suppressed documents, it is apparent that the House was never apprised of the facts that:

A. Long before petitioners took the stand, their counsel had requested that other witnesses be recalled for the purposes of cross-examination, and

B. The motion to quash the subpoenas was considered at length by the Committee, a recess even being taken for this purpose.[7]

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[6]In offering prepared statements petitioners were merely affording the Chairman an opportunity to comply with Section 133e of the Legislative Reorganization Act of 1946, 60 Stat. 812, which provides that: "Each such standing committee shall, so far as practicable, require all witnesses appearing before it to file in advance written statements of their proposed testimony, * * *"

[7]"Mr. Stripling: Mr. Chairman, the point which Mr. Kenny has set forth—if he has a remedy it is in the courts of the land and not before a committee of Congress. A committee of Congress can no more set aside a law than it can do any other thing. Therefore, Mr. Kenny should go into court, if he seeks any remedy on the points which he has submitted to the committee. I see no point for the committee to interrupt its proceedings to permit Mr. Kenny to stand up and make a lot of points which he knows are out of order before this tribunal.

"Mr. Kenny: Just one brief response to that, and that is: The committee is the servant of the Constitution, just as much as the citizen is, and certainly Congress should be given the opportunity, or any committee of Congress, to consider whether or not it is proceeding constitutionally.

"It is quite true, as Mr. Stripling says, that the courts are open, but I believe that the first opportunity should be given the person who first is accused of proceeding illegally.

"Now, the Committee has this opportunity at this time to consider the basic constitutional principles under which it is proceed-

The Government apparently concedes that a jurisdictional requirement of Section 194 is that the House be adequately informed before it votes a contempt citation. Petitioners submit that evidence essential to a full consideration of the contempt citation was kept from the knowledge of the House in contravention of the statute.

8. The Government apparently concedes that the writ should be granted with respect to the question of the in-

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ing, and I think it would be the first time that this committee ever has done that. I think, if we are given that opportunity, the commitee might well rule with us, if they can hear our arguments out and give them full consideration.

"The Chairman: All right, Mr. Kenny, we have read your brief very carefully. In view of the additional points, however, which you bring up, why, the committee will now take under consideration the whole question, not only based on your original brief, but also these additional points.

"The committee will go into executive session until we have concluded.

"Mr. Crum: Mr. Chairman, may I ask that you consider our motion to cross-examine—

"The Chariman: The meeting will be in recess. The committee will leave the room and go into executive session.

"Mr. Crum: May we hand these to you, Mr. Chairman?

"The Chairman: Yes; glad to have them.

"Mr. Crum: Thank you.

"(The committee went into executive session.)

"The Chairman: The meeting will come to order.

"Mr. Kenny, this is the unanimous decision of this subcommittee. It is the decision on the brief which you submitted, plus the two additional points.

"Mr. Kenny: Yes.

"The Chairman: No committee of Congress has the right to establish its own legality or constitutionality. A committee of Congress cannot disqualify itself from the provisions of the law. We operate under Public Law 601. We cannot set aside this law to suit the convenience of certain witnesses or their counsel. As a former attorney general of the State of California you certainly know that your remedy, if any, is in the courts." (Hearings before Committee on Un-American Activities, 80th Cong., 1st Sess., pp. 288, 289.)

clusion of Government employees in the panel and on the jury.

9. The effect of the question, "Have you any views opposed to the American form of government?" is given no consideration by the Government. The language of the Eighth Circuit Court of Appeals dealing with a similar problem, in *Gideon v. United States,* 52 F. 2d 427, delineates what the Government refuses to face:

> "The effect of the questionnaire upon the jurors must have been baneful; they must have been led to believe that the government had some purpose in asking questions about their beliefs, and was keeping a record of the answers for future use; they doubtless were led to believe also that, in the minds of the government officials, at least, their usefulness as jurors was in some way affected by the beliefs about which inquiry was made; and it is not impossible that they were led to think that the government intended to influence them in their beliefs. * * *
>
> "The qualifications of a juror should be ascertained by questioning in open court in the presence of the parties interested and while the juror is under oath. Secret preliminary questioning is unauthorized, and, in our opinion, should not be encouraged. It is open to the danger of many and serious abuses, and trenches upon the broad ground of fair trial." (p. 429.)

Had the jury commission openly adopted and carried out a policy embracing different standards of eligibility for those in the lower economic categories than for those in the higher categories, the discrimination would have been clear. This clarity would have existed if the Jury Commission had said that it was not concerned about the handwriting of those in higher brackets but would disqualify some of the persons in the lower brackets because of defects in handwriting. Here the process was reversed. The handwriting of all jurors was examined, but of those with "poor" handwriting, only those in the lower economic brackets were disqualified. The reversal of the process tended to conceal its meaning but actually did not change its character or effect. The result was a "systematic and intentional exclusion" of persons in the lower economic categories, condemned by this Court as "abhorrent to the democratic ideals of trial by jury." (*Thiel v. Southern Pacific*, 328 U. S. 217, 220.) The fact that not all persons in the lower economic categories were excluded but that they were merely discriminated against is no more justifiable than is discrimination against Negroes, as distinguished from their *total* exclusion. (*Smith v. Texas*, 311 U. S. 128.)

The petitions for certiorari in each of the cases should be granted in their entirety.

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